

PREMJEET KAUR NIKI SINGH

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v.

CHIEF INSPECTOR WONG PENG TECK & ORS

HIGH COURT MALAYA, KUALA LUMPUR

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AMELIA TEE ABDULLAH JC

[SUIT NO: 21NCVC-46-2011]

25 JULY 2011

CIVIL PROCEDURE: *Striking out - Application for - Grounds - Failure to name actual tortfeasors - Whether action unsustainable - Government Proceedings Act 1956, ss. 5 & 6 - Rules of the High Court 1980, O. 18 r. 19*

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The plaintiff brought an action in tort against the defendants for causing her to be detained by the Malaysian Immigration officers who handed her over to the police who arrested and put her in a police station lock-up overnight. The plaintiff claimed she was handcuffed in public and not told of the grounds of her arrest. Only on the following day when she was produced before a magistrate for a remand order did she know her arrest and detention was in connection with investigations into a fraud case involving a substantial sum of money. The plaintiff said she was informed when arrested that she was detained on the instructions of the first defendant who was the investigating officer of the fraud case. The plaintiff said the police action was uncalled for as they knew her address and telephone number and she had, in fact, written to the first defendant to inform him of her readiness to assist in police investigations. The plaintiff claimed that as a result of the arrest and detention, she suffered mental, physical and emotional stress and anxiety. She sued the second defendant as the first defendant's ultimate superior officer and the third defendant for being vicariously liable for the acts/omissions of the other defendants. The defendants applied under O. 18 r. 19 of the Rules of the High Court 1980 ('RHC') to strike out the action on the grounds that it failed to disclose a reasonable cause of action against them and was frivolous, vexatious and an abuse of process of the court. The defendants said that the plaintiff had failed in her claim to name the actual tortfeasors who had arrested and detained her or had allegedly committed other tortious acts against her as the first and second defendants were not the ones who did so. The plaintiff raised a preliminary objection to the defendants' application. She said the defendants' failure to enter a conditional appearance precluded them from proceeding with the striking out and that the filing of a statement of defence showed there were triable issues.

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A Held (allowing defendants' application and striking out the action with costs):

- (1) The filing of an unconditional appearance by the defendants did not preclude them from filing a striking out application under O. 18 r. 19 of the RHC. (para 15)
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- (2) For the second and third defendants to be liable, the actual tortfeasors not only had to be named but they had to be brought in as defendants in the suit. This meant that the actual naming of the various persons who allegedly committed some tortious acts against the plaintiff including the Immigration officers who detained her, the officers who handcuffed and detained her in the lock-up, those who told her the investigating officer was the first defendant and the officers who threatened not to give her breakfast unless she took a bath. The naming of these tortfeasors, and adding them as defendants to the action, was essential to enable the court to link the alleged tortious acts with the first defendant. (paras 26 & 28)
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- D**
- (3) Merely naming the first defendant and alleging that he was the person responsible for everything that had happened to the plaintiff, for all the tortious acts that were committed by a myriad of persons against her, was insufficient and ran contrary to ss. 5 and 6 of the Government Proceedings Act 1956 and established authorities on the point. (paras 28 & 36)
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- (4) The first defendant as an investigating officer in the course of conduct of investigations was not required to inform the plaintiff of the status or development of his investigations. (para 37)
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Case(s) referred to:

- Alor Janggis Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [1995] 1 CLJ 461 SC (**refd**)
- Anchorage Mall Sdn Bhd v. Irama Team (M) Sdn Bhd & Anor* [2001] 7 CLJ 313 HC (**refd**)
- G** *Bandar Builders Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 SC (**refd**)
- Bank Bumiputera (M) Bhd & Anor v. Lorrain Esme Osman & Another Case* [1987] 1 CLJ 572; [1987] CLJ (Rep) 472 HC (**fol**)
- Boey Oi Leng v. Trans Resources Corporation Sdn Bhd* [2002] 1 CLJ 405 HC (**refd**)
- H** *Government of the State of Sabah v. Syarikat Rasband* [2010] 7 CLJ 945 CA (**refd**)
- Haji Abdul Rahman v. Government of Malaysia & Anor* [1966] 1 LNS 60 HC (**refd**)
- Jamir Hassan Najir Hassan v. Kang Min* [1991] 3 CLJ 2490; [1991] 2 CLJ (Rep) 773 HC (**fol**)
- Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* [2009] 1 CLJ 663 FC (**refd**)
- I** *Lim Seak Huat v. Malayan United Realty Sdn Bhd* [1997] 5 CLJ 336 HC (**refd**)
- N Carrupaiya v. MBf Property Services Sdn Bhd & Anor* [2000] 4 CLJ 116 HC (**fol**)
- New Straits Times (Malaysia) Bhd v. Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 LNS 1 FC (**refd**)

Legislation referred to:

Criminal Procedure Code, s. 107A

Government Proceedings Act 1956, ss. 5, 6

Rules of the High Court 1980, O. 12 r. 6, O. 18 r. 19(1), (a), (b), (c), (d)

For the plaintiff - Ajeet Kaur (Saha Deva Arunasalam with her); M/s Saha & Assoc

For the defendants - Azlina Mahmud (Maisarah Juhari FC with her); SFC

Reported by Ashok Kumar

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JUDGMENT**Amelia Tee Abdullah JC:**

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[1] The defendants had, *vide* encl. 6, applied to strike out the plaintiff's writ of summons and statement of claim under O. 18 r. 19(1) (a), (b) and (d) of the Rules of the High Court 1980 ("RHC") on the grounds that the plaintiff had failed to disclose a reasonable cause of action against the defendants, that her claims were frivolous and vexatious and an abuse of the process of the court. The reasons stated in encl. 6 for the application are:

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- (i) that the plaintiff had failed to name the tortfeasors in the claim; and
- (ii) that the 2nd defendant should not have been named as a defendant in this case.

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No affidavit was filed by the defendants in support of this application.

[2] The plaintiff, in her 'afidavit jawapan' (encl. 8), had raised a preliminary objection to the effect that the defendants' application was defective and not in compliance with O. 18 r. 19 of the RHC in that the defendants had failed to enter conditional appearance as provided under O. 12 r. 6 of the RHC 1980 before filing the present application. Instead, the defendants had filed its statement of defence and this would clearly indicate that there were issues to be tried.

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[3] In para. 9 of encl. 8, the plaintiff avers that the defendants' application is but an afterthought, made with the intention of delaying the hearing which had been fixed for 25 July 2011 and 26 July 2011.

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[4] The plaintiff refers to para. 10 of the defence where the defendants had admitted that the plaintiff had been blacklisted as a wanted person. The reason given was that the plaintiff could not be traced to have her statement recorded to assist in police investigations. As the plaintiff had never changed either her address or her telephone number, she avers that the 1st defendant had failed, was negligent or had refused to trace and call her to have her statement recorded. Instead, the 1st defendant had taken a shortcut in arbitrarily blacklisting her.

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[5] The plaintiff states that she had been advised by her solicitors that she had clearly, correctly and accurately ("secara jelas, betul dan tepat") named her tortfeasors in her claim, namely the 1st defendant in para. 2,

- A the 2nd defendant in para. 3 and the 3rd defendant in para. 4 because all the actions taken by the police against her were on the instructions of the 1st defendant, full particulars of which were allegedly set out in para. 21 of her statement of claim. In para. 12 of encl. 8 she avers that her claim against the 2nd defendant is as the party responsible for
- B all the official acts and duties of the Royal Malaysian Police, including that of the 1st defendant. The claim against the 3rd defendant is for vicarious responsibility for the failure of the 1st and 2nd defendants in carrying out their duties.
- C [6] The plaintiff avers that she is the 4th defendant in Civil Suit S6-22-751-2006 filed by Clutch Auto Limited and Vijay Krishnan Mehta and that a false report had been lodged against her by the said Vijay Krishnan Mehta. In her affidavit, she took issue over the fact that despite lodging a police report on 12 April 2007 and exhibiting a copy of her passport which shows that she was in Singapore between
- D 8 June 2004 and 22 June 2004, and writing a letter dated 31 May 2007 to the 1st defendant as the Investigating Officer, she was not called to have her statement recorded. Instead, she was detained by the Malaysian Immigration and handed over to the police at the Second Link. She was then handed over to a police officer from Balai Police Larkin, handcuffed in front of many people and brought to Larkin where she was detained
- E in the lock-up. She was only informed that she was being detained in relation to a fraud case involving millions of ringgit and produced before the Magistrate on 24 February 2008.
- F [7] According to the plaintiff, the police at the Second Link and Larkin “telah memaklumkan dan mengesahkan bahawa pegawai penyiasat adalah Chief Inspektor Wong Peng Teck dari Kuala Lumpur dan hanya memaklumkan bahawa saya telah ditahan atas arahan beliau”
- G [8] On 26 February 2008, the plaintiff had lodged a police report against the 1st defendant in connection with the latter’s negligent and *mala fide* actions. She had also written several letters to the 1st defendant to express her readiness to attend for purposes of investigation but had received no response. Further letters dated 8 April 2008, 25 April 2008 and 6 May 2008 to the 1st defendant, the Ketua Balai Polis Brickfields and the Attorney General’s Chambers respectively also
- H elicited no response.
- I [9] The plaintiff claims that following her detention by the police where she was handcuffed and had to spend a night in the lockup, she had suffered stress, difficulty in sleeping, nightmares and a fear of venturing out alone. She often cried and was unable to control her emotions. She became fearful when people knocked at her door, her mental and physical health declined and she had to seek psychiatric treatment at the University of Malaya Specialist Centre.

The Preliminary Objection

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[10] As stated earlier, the plaintiff has raised a preliminary objection to encl. 8. The plaintiff submits that the defendants had failed to enter conditional appearance as provided under O. 12 r. 6 of the RHC 1980 before filing the present application but had instead filed its defence. The plaintiff submits that this would clearly indicate that there are indeed issues to be tried. As submitted by the plaintiff “On the face of the pleadings there are issues to be tried”

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[11] In support of this argument, the plaintiff has cited the case of *Anchorage Mall Sdn Bhd v. Irama Team (M) Sdn Bhd & Anor* [2001] 7 CLJ 313 HC. In that case, the question that arose for consideration was whether the defendant, who had filed unconditional appearance, was precluded from making an application under O. 18 r. 19 of the RHC to strike out the writ and statement of claim filed by the plaintiff. The defendant had argued that from the language employed by the provisions under O. 18 r. 19, it was clear that an application to strike out a statement of claim can be made at any stage of the proceedings. The High Court, in allowing the preliminary objection had followed the Supreme Court case of *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [1995] 1 CLJ 461 SC. Ahmad Maarop JC (as His Lordship then was) had followed Abdul Malik Ishak J in *Lim Seak Huat v. Malayan United Realty Sdn Bhd* [1997] 5 CLJ 336 HC, when he had cited *Alor Janggus (supra)* as follows:

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It is now too late for the defendants to invoke O. 18 r. 19 of the RHC because they must have filed their unconditional appearance, thus depriving themselves of the right to invoke O. 18 r. 19 but it is still open to them to have recourse to O. 33 r. 2 of the RHC if they are so minded.

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[12] In response, the learned Senior Federal Counsel had submitted that the decision in *Alor Janggus (supra)* is only *obiter*. She had drawn the court’s attention to the case of *N Carrupaiya v. MBf Property Services Sdn Bhd & Anor* [2000] 4 CLJ 116 HC, where Hishamudin Yunus J, in referring to *Alor Janggus*, had held as follows:

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With respect, I must differ. In my judgment, the filing of an unconditional appearance does not preclude a defendant from making an application under O. 18 r. 19. I find nothing in the RHC providing, either explicitly or impliedly, to that effect. On the contrary, O. 18 r. 19 expressly provides that such an application may be made at any stage of the proceeding. The words “at any stage of the proceedings”, to my mind, strongly imply that the right to make an application under O. 18 r. 19 is not conditional upon the filing of a conditional appearance. Such an application may be made, for example, after the filing of the statement of defence; or, even after the pleadings are deemed to be closed. Normally, a statement of defence is filed only after the filing of an unconditional memorandum of

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- A appearance; or, if a conditional appearance had been previously filed, the statement of defence is filed only after the conditional appearance has, by operation of law, become an unconditional appearance.

- [13] In the case of *N Carrupaiya (supra)*, Hishamudin Yunus J had followed the decision of Zakaria Yatim J (as he then was) in
B *Bank Bumiputera (M) Bhd & Anor v. Lorrain Esme Osman & Another Case* [1987] 1 CLJ 572; [1987] CLJ (Rep) 472 HC, where His Lordship held that O. 18 r. 19 does not specify a time limit during which a party may apply to the court to strike out a pleading. Also referred to was the decision of Haidar J (as he then was) in *Jamir Hassan Najir Hassan*
C *v. Kang Min* [1991] 3 CLJ 2490; [1991] 2 CLJ (Rep) 773 HC, where the court followed the decision in *Bank Bumiputera Malaysia*.

[14] Referring back to the decision of Hishamudin Yunus J in *N Carrupaiya*, His Lordship had stated in p. 122 as follows:

- D I shall now revert to *Alor Jangus*. In the light of the authorities and the expressed provision of O. 18 r. 19 itself, the remark of Jemuri Serjan CJ (Borneo) in that case to the effect:

- E It is too late now for the defendants to invoke O. 18 r. 19 because they must have filed their unconditional appearance, thereby depriving themselves of the right to invoke O. 18 r. 19 but it is still open to them to have recourse to O. 33 r. 2 if they are so minded.

- F is, to my humble mind and with the greatest respect, rather unsettling. For such a statement implies that an O. 18 r. 19 application can only be made if the defendant had previously filed a conditional appearance (as opposed to an unconditional appearance). In all humility, I find great difficulty in understanding this proposition. First and foremost, the learned Chief Justice (Borneo) did not explain why the Supreme Court held such a view—that the filing of an unconditional appearance precludes a defendant from making an O. 18 r. 19 application; nor
G were authorities cited to support the proposition. I find that there is absolutely nothing either in the provision of O. 18 r. 19 or in the provisions of O. 12 rr. 6 and 7 (the provisions dealing with conditional appearance) that stipulates or implies that such an application cannot be made once an unconditional appearance has been filed. On the contrary, such a view as expounded by the Supreme Court appears to
H run counter to the express provisions of O. 18 r. 19 which clearly stipulates that the application may be made at any stage of the proceedings.

- [15] In light of the fact that that brief remark of Jemuri Serjan CJ (Borneo) is merely an *obiter dicta* which is not binding upon this court, the court is inclined to follow the decisions in *N Carrupaiya*, *Bank Bumiputera Malaysia Bhd* and *Jamir Hassan* in finding that the filing of an unconditional appearance by the defendants do not preclude them from filing a striking out application under O. 18 r. 19 of the RHC.
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Principles of Law in Striking Out Applications

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[16] The principles of law in relation to striking out applications are clear. The case of *Bandar Builders Sdn Bhd & Ors v. United Malaysian Banking Corporation Bhd* [1993] 4 CLJ 7 SC, was relied upon by both parties. In that case, His Lordship Mohamed Dzaiddin bin Hj Abdullah SCJ had stated as follows:

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The principles upon which the court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) Rules of the High Court are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck v. Wilkinson* [1899] 1 QB 86, p. 91), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it “obviously unsustainable” (*Attorney-General of Duchy of Lancaster v. L & NW Ry Co* [1892] 3 Ch 274, CA). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (*Wenlock v. Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871, CA) ...

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... It has been said that so long as the pleadings disclose some cause of action or raise some question fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out (*Moore v. Lawson* [1915] 31 TLR 418 CA); (*Wenlock v. Moloney*) (*supra*).

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[17] Both parties have submitted on and are in agreement that in an application to strike out pleadings under O. 18 r. 19(1)(a) of the RHC, no evidence shall be admissible and the court must consider only the pleadings for the purpose of determining whether the statement of claim disclosed no reasonable cause of action. In the case of *New Straits Times (Malaysia) Bhd v. Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 LNS 1 FC, the Federal Court held as follows:

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It is therefore clear law that in an application to strike out pleadings under O. 18 r. 19(1) (a), no evidence shall be admissible, and the court must consider only the pleadings for the purpose of determining whether the statement of claim disclosed no reasonable cause of action or the statement of defence disclosed no defence. The test to be applied is whether on the fact of the pleadings, the court is prepared to say that the cause of action or the defence is obviously unsustainable (see *AG of the Duchy of Lancaster v. L and NW Ry Co* [1892] 3 Ch 274.

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The Defendant's Application

[18] The defendants' application is premised on two broad grounds, namely:

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- (i) That the plaintiff's claims have no reasonable cause of action as she had failed to name the actual tortfeasors; and

- A (ii) The plaintiff's claim re the 1st defendant's failure to supply a report on the status of investigations discloses no reasonable cause of action, is frivolous, vexatious and an abuse of the court process.

The First Ground - Whether Actual Tortfeasors Named

- B [19] The plaintiff's first ground is made pursuant to O. 18 r. 19(1)(a) in that the statement of claim discloses no reasonable cause of action as the plaintiff had failed to name the actual tortfeasors. In the statement of claim the plaintiff had alleged as follows:

- C (i) The plaintiff was prevented from proceeding to Singapore to visit and take care of her beloved uncle who had undergone a bypass operation when she was detained at the Second Link by an Immigration Officer. She was informed by the said Immigration Officer that she had been blacklisted by the Royal Malaysian Police and was not allowed to leave Malaysia (para. 9 of SOC);
- D (ii) She was handed over to the police at the Second Link before being handed over to a police officer from Balai Polis Larkin at about 10.30 p.m. She was not informed of the grounds of her arrest. She was also handcuffed in public and brought to Balai Polis Larkin. She
- E was detained overnight at Balai Polis Larkin and it was only when she was produced before a magistrate the next day that she was informed that she was being detained in respect of a fraud case involving millions of ringgit (para. 10 of SOC);
- F (iii) The police at the Second Link as well as Balai Polis Larkin had informed her that the Investigating Officer was the 1st defendant, Chief Inspector Wong Peng Teck, and that the plaintiff was detained on his instructions (para. 11 of SOC);
- G (iv) On 24 February 2008, a police officer named Inspector Wirawati from Balai Polis Nusajaya had brought the plaintiff before the magistrate to obtain an order for remand (para. 14(a) of SOC);
- H (v) Police officers had threatened the plaintiff that if she refuses to bathe they would not give her breakfast. She was forced to bathe together with other detainees. She complained that this was a frightening experience which had also outraged her modesty (para. 19 of SOC).

- I [20] The learned Senior Federal Counsel had submitted that the plaintiff had not named the tortfeasors even once and that because of such failure; the plaintiff's claims disclosed no reasonable cause of action and would therefore fail. She argues that the 1st and 2nd defendants were not the parties who had arrested and detained the plaintiff and that

they were therefore not the right parties to be sued in this case. As the plaintiff's claims disclose no reasonable cause of action, she submits that the court has the power to strike out the plaintiff's entire claim.

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[21] It is the defendants' submission that in any claim against the government, the officer of the government must be made a party and his liability must be established before the government can be made liable vicariously. It is insufficient to merely identify the officer without joining the officer as a party because liability by evidence would need to be established first. It is only upon a successful claim against the officer personally that a claim can be laid against the government.

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[22] Sections 5 and 6 of the Government Proceedings Act 1956 reads as follows:

5. Liability of the Government in tort

Subject to this act, the government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the government.

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6. Limits of Liability of the Government

(1) No proceedings shall lie against the government by virtue of s. 5 in respect any act, neglect or default of any public officer, unless proceedings for damages in respect of such act, neglect or default would have lain against such officer personally.

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[23] In the case of *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* [2009] 1 CLJ 663 FC, the appellants were the Government of Malaysia and the State Governments of Negeri Sembilan, Perak and Selangor. The respondents were 184 respondents who had allegedly suffered from the Japanese Encephalitis (JE/Nipah virus) or were dependants of persons who had died from the virus or owners of pig farms affected by the virus. The affected respondents had requested the appellants to cull the pigs to contain the spread of the virus. Subsequently, they brought an action against the appellants, *inter alia*, for negligence on the ground that the appellants did not act fast enough to contain the spread of the virus. They claimed that the appellants allowed the situation to worsen to such an extent that it caused them to suffer injury. The SAR struck out the action pursuant to O. 18 r. 19(1)(a), (b), (c) and (d) of the RHC 1980. The High Court affirmed the SAR's decision. The

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A respondents' appeal to the Court of Appeal was allowed with no order as to costs. On further appeal by the appellants, the Federal Court, in allowing the appeal, held *inter alia* as follows:

B In any claim in tort against the government, the government officer who was responsible for the alleged tortious act must be made a party and his liability must be established before the government could be made vicariously liable as principal (ss. 5, 6 of the Government Proceedings Act 1956). It would be insufficient to merely identify the officer without joining the officer as a party because liability by evidence needed to be established. It was only upon a successful claim against the officer personally could a claim be made against the government.

[24] In the case of *Government of the State of Sabah v. Syarikat Rasband* [2010] 7 CLJ 945 CA, the Ministry of Primary Industries Malaysia had approved the respondent's application to import logs for sale to local sawmills in Tawau. The appellant seized a total of 3,056 logs on suspicion that offences under the Sabah Forest Enactment 1968 had been committed. The Tawau Magistrate's Court ordered the logs to be returned to the respondent and the logs were so returned. The respondent then commenced an action for wrongful seizure of the logs against the appellant only. No other tortfeasors were named as defendants. The High Court held the appellant liable for wrongful seizure of the respondent's logs and allowed the claim. The appellant in his appeal had claimed that the respondent's action was tort-based but the respondent had only named the Government of the State of Sabah as defendant without naming the alleged tortfeasors and as such the action was not sustainable in law. In allowing the appeal, Low Hop Bing JCA held as follows:

G Section 6 expressly prohibits the bringing of any proceedings against the government for damages under s. 5 unless the action for such wrongful act, neglect, or default would have lain against the officer personally. This is a substantive provision that goes to the jurisdiction of the court. Liability can only be attributed to the government where the officer's act, neglect or default is proved to have established the liability of the officer personally. In the absence of the officer's liability (which can only arise and bind the officer(s) if and when the officer or officers are cited as defendants), no proceedings shall lie against the government. Where no such proceedings could lie against the government, the court is in no position to exercise any jurisdiction in relation thereto.

I The Court of Appeal in *Rasband's* case had also considered the High Court case of *Haji Abdul Rahman v. Government of Malaysia & Anor* [1966] 1 LNS 60 HC. There the plaintiff had brought an action to recover damages arising out of a traffic accident in which a government steam roller had been parked on the road at night. The deceased

motorcyclist had crashed into the steam roller. The issue that arose for consideration was whether the action against the government as principal was bad in law. The High Court, after examining ss. 5 and 6 of the Government Proceedings Act 1956, concluded that the identity and liability of the government servant must be ascertained and established before the government could be made liable.

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[25] On the issue of whether the tortfeasors had been named, learned counsel for the plaintiff had submitted that the three defendants had been named as tortfeasors. Learned counsel had submitted that the tortfeasor is the 1st defendant and that it was the actions of the 1st defendant that had caused the plaintiff to be detained. The plaintiff had also alleged that the 1st defendant had admitted to blacklisting the plaintiff.

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[26] The court has carefully perused the statement of claim as well as the written submissions of both parties. The court finds that on the strength of ss. 5 and 6 of the Government Proceedings Act 1956 and the authorities of superior courts cited by the learned Senior Federal Counsel, the law is clear that for the 2nd and 3rd defendants to be liable, the actual tortfeasors must not only be named but they must also be brought in as defendants in the suit. The naming of the tortfeasors means the actual naming of the various persons alleged to have committed some tortious act against the plaintiff. This would include the names of the Immigration Officers who physically prevented the plaintiff from proceeding on her journey, who detained her at the Second Link and who told her that she had been blacklisted by the Royal Malaysian Police. The tortfeasors would include the police officer at the Second Link as well as the police officer at Balai Polis Larkin as the persons who detained her, who curtailed her freedom and who handcuffed her in public. Who was the police officer who detained her overnight at Balai Polis Larkin? What were the names of the police officers at the Second Link and Balai Polis Larkin who had informed her that the Investigating Officer was the 1st defendant? What were the names of the police officers who had threatened the plaintiff that she would not be given breakfast if she refused to take a bath?

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[27] The court finds that not only were these tortfeasors not named but they were also not joined in as defendants in this action. The court notes that although an Inspector Wirawati from Balai Polis Nusajaya was named as the person who had brought the plaintiff to the magistrate for the purpose of obtaining an order for remand on 24 February 2008, however the said Inspector Wirawati was not joined as a defendant.

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[28] The naming of these tortfeasors is essential to enable the court to link the alleged tortious acts committed against the plaintiff with the 1st defendant. The court finds no admission by the 1st defendant to the effect that it was he who had blacklisted the plaintiff. The court further finds that only naming the 1st defendant and alleging that he is the

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A person who was responsible for everything that had happened to the plaintiff, for all the tortious acts that were committed by a myriad of persons against the plaintiff, runs contrary to ss. 5 and 6 of the Government Proceedings Act 1956 and established authorities on this issue.

B **The Second Ground - Was The 1st Defendant Was In Breach Of His Duties?**

[29] The second issue relates to whether the 1st defendant was in breach of his duties. He is alleged in the statement of claim to have:

- C (i) Failed to call the plaintiff to have her statement recorded immediately after the plaintiff had lodged her police report on 12 April 2007;
- (ii) Failed to take note of or take action on the plaintiff's police report;
- D (iii) Failed to provide any feedback in relation to the investigations pursuant to s. 107A of the Criminal Procedure Code.

E [30] It is submitted by the learned Senior Federal Counsel that the plaintiff's claims against the 1st defendant as outlined in para. 29 above discloses no reasonable cause of action, is frivolous, vexatious, and an abuse of the court process. The basis for this submission is the provisions of s. 107A of the Criminal Procedure Code which reads as follows:

Report on status of investigation

- F 107A. (1) Any person who has given information under s. 107 may request for a report on the status of the investigation of the offence complained of in his information from the officer in charge of a police station where he gave the information.
- G (2) The officer in charge of a police station shall give a status report on the investigation of such offence to the informant not later than two weeks from the receipt of the request made under subsection (1).
- (3) Notwithstanding subsection (2), no officer in charge of a police station shall be required to provide a status report on an investigation of an offence:
- H (a) unless the offence complained of is a seizable offence;
- (b) unless a period of four weeks has lapsed from the date of the giving of the information under s. 107; and
- I (c) which contains any matter that is likely to adversely affect the investigation into the offence or the prosecution of the offence.

[31] It is the defendant's submissions that the 1st defendant as the investigation officer is protected from supplying any status report of an investigation of an offence. Informing the plaintiff about the investigation

would jeopardise the investigation. As such it is submitted that the plaintiff's claims are obviously unsustainable as the claims disclose no reasonable cause of action, are frivolous and vexatious and an abuse of the process of the court.

[32] A number of authorities have been cited to highlight what would constitute a frivolous and vexatious claim. In *Boey Oi Leng v. Trans Resources Corporation Sdn Bhd* [2002] 1 CLJ 405 HC, it was held by the Court that:

A petition may be described as "frivolous" or "vexatious" where it is obviously unsustainable eg, where the petition is *res judicata*, or where the wrong party is being sued, or without merit and unjustified: see Malaysian High Court Practice, *supra*.

[33] The court notes the plaintiff's submissions about the lack of action or inaction of the 1st defendant. On this issue, the court finds that the plaintiff's claims on this score are obviously misplaced and unsustainable. Mere failure to respond as the plaintiff would have liked would fall far short of a tortious act for which liability could be attached. It must be borne in mind that in carrying out investigations into criminal offences, a high degree of confidentiality would be necessary to ensure the success of police operations and investigations. The court finds the plaintiff's complaints about the delay in recording her statement and the failure to respond to her and her counsel's calls to be frivolous, to say the least. In any event, it must be noted that under s. 107A, it is the officer in charge of a police station and not the investigation officer who should give the status report, if it would not adversely affect the investigations. As such, the court finds the plaintiff's claims against the defendant on this score to be clearly unsustainable.

[34] One last issue. The plaintiff *vide* Further Submissions (2) dated 12 July 2011, way after the second round of submissions on 21 June 2011, has submitted the case of *Bank Bumiputera (M) Bhd & Anor v. Lorrain Esme Osman and Another Case (supra)*, as the authority for the proposition that an application for striking out must be refused after the action has been set down for trial.

[35] On this issue, it must be borne in mind that the present case is registered in NCVC 4. The case was registered on 23 February 2011 and should be completed within nine months. After case managements held on 17 March 2011, 14 April 2011 and 22 April 2011, the court had on 6 May 2011 fixed hearing dates on 25-26 July 2011. The defendant's application for striking out filed on 5 May 2011 was first scheduled for hearing on 19 May 2011 but was adjourned at the request of the plaintiff as counsel was on maternity leave. From court records the hearing dates were fixed even though the parties had yet to file all necessary documentation such as the bundle of pleadings, agreed facts,

- A agreed issues to be tried, common bundle, and witness statements because the court's hearing dates were fast depleting and to afford the parties' representatives some choice as to hearing dates. The court notes that even as to date, all the aforementioned documentation necessary for a full trial have yet been filed by the parties. As such, the court is
- B unable to find that the defendants' striking out application is either an afterthought or was designed to delay the hearing of the action. On the contrary, the court finds the plaintiff's submission on this score to be without merit and would dismiss it accordingly.

Conclusion

- C
- D [36] In conclusion, the court finds that the plaintiff had failed to name the alleged perpetrators of the tortious acts committed on her as well as to join them as defendants in this action. As regards the tortious acts that were alleged to have been committed by the 1st defendant as a named tortfeasor, the court finds that merely saying that the whole chain of events is a result of the actions and inactions of the 1st defendant is insufficient. The actual tortfeasors must still be named and made parties so that the 1st defendant as well as the other defendants can respond appropriately in order for the court to determine if their actions were indeed done on the instructions and at the behest of the 1st defendant.
- E
- F [37] As regards the allegations about the 1st defendant's lack of action in relation to the conduct of investigations, the court finds the plaintiff's claim in this regard to be clearly unsustainable. The 1st defendant, as an Investigation Officer in the course of the conduct of investigations, is not required to inform the plaintiff of the status or developments. And once the claim against the 1st defendant is unsustainable, the claims against the 2nd and 3rd defendants would likewise fail.
- G [38] The court finds that this is a plain and obvious case where recourse should be had to the summary process under O. 18 r. 19(1)(a), (b) and (d), as the plaintiff's claim as it stands discloses no reasonable cause of action, is scandalous, frivolous and vexatious and clearly an abuse of the process of the court. Accordingly, the court hereby orders that the plaintiff's claim against the defendants be struck out with costs to be taxed unless otherwise agreed.
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